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ILLINOIS COMMERCE COMMISSION

STATE OF ILLINOIS

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CHIEF CLERK'S OFFICE

Illinois Commerce Commission

On its Own Motion

v.

No. 05-0407

Quality Saw & Seal, Inc.

**Determination of Liability Under the
Illinois Underground Utility Facilities
Damage Prevention Act**

MEMORANDUM IN SUPPORT OF
MOTION TO DISMISS

NOW COMES the respondent, **QUALITY SAW & SEAL, INC.**, by and through its attorney, **LAW OFFICE OF JOSEPH P. BUELL**, and for its Memorandum in Support of its Motion to Dismiss the above-captioned cause states as follows:

The Staff of the Illinois Commerce Commission has assessed a penalty in the amount of \$ 450.00 against respondent, Quality Saw & Seal, Inc., for allegedly failing to give proper notice of excavation work to JULIE, before beginning excavation work at 2180 Kipling Lane, Highland Park, Illinois, and thereby violating Section 4(d) of the Illinois Underground Utility Facilities Damage Prevention Act. According to the Staff Report issued on June 8, 2005, respondent, Quality Saw & Seal, Inc., damaged a ¾ inch plastic gas service owned and operated by North Shore Gas Company while saw-cutting paving material in connection with a roadway rehabilitation project.

By Order entered on June 29, 2005, the Commission initiated a de novo proceeding under Article X of the Public Utilities Act, 220 ILCS 5/Art.X, and under 83 Ill.Admin.Code 200 and 265 to determine whether a violation of Section 4(d) of the Act occurred on August 10, 2004.

The sole issue presented in this cause is an issue of law, whether the saw-cutting of concrete pavement material by respondent, Quality Saw & Seal, Inc., was an "excavation" within the meaning of the Act. Section 2.3 of the Act, 220 ILCS 50.2.3 defines "excavation" as follows:

"'Excavation' means any operation in which earth, rock or other material in or on the ground is moved, removed, or otherwise displaced by means of any tools, power equipment or explosives and includes without limitation grading, trenching, digging, ditching, drilling, auguring, boring, tunneling, scraping, cable or pipe plowing and driving but does not include farm tillage operations or railroad right-of-way maintenance or operations or coal mining operations regulated under the Federal Surface Mining Control and Reclamation Act of 1977 or any State law or rules or regulations adopted under the federal statute, or land surveying operations as defined in the Illinois Professional Land Surveyor Act of 1989 when not using power equipment. "

In construing the term "excavation," the Commission must be guided by the same rules of statutory construction applied by Illinois courts. In *Carver v. Sheriff of LaSalle County*, 203 Ill.2d 497, 787 N.E.2d 127 (2003), the Illinois Supreme Court stated as follows:

"It is well settled that the primary objective of this Court in construing the meaning of a statute is to ascertain and give effect to the intent of the legislature. *Harinek v. 161 North Clark Street Ltd. Partnership*, 181 Ill.2d 335, 340, 692 N.E.2d 1177 (1998); *Boaden v. Department of Law Enforcement*, 171 Ill.2d 230, 237, 664 N.E.2d 61 (1996). All other rules of statutory construction are subordinate this cardinal principle. *Sylvester v. Industrial Commission*, 197 Ill.2d 225, 232, 756 N.E.2d 822 (2001);

Henrich v. Libertyville High School, 186 Ill.2d 381, 387, 712 N.E.2d 298 (1998). We determine legislative intent by examining the language of the statute, which is the most reliable indicator of the legislature's objectives in enacting a particular law. *Michigan Avenue National Bank*, 191 Ill.2d at 504; see also *Yang v. City of Chicago*, 195 Ill.2d 96, 103, 745 N.E.2d 541 (2001); *Nottage v. Jeka*, 172 Ill.2d 386, 392, 667 N.E.2d 91 (1996). This court will not depart from the plain language of a statute by reading into it exceptions, limitations or conditions that conflict with the express legislative intent. *Peterson v Wallach*, 198 Ill. 2d 439, 446, 261 Ill. Dec. 728, 764 N.E. 2d 19 (2002).

Because all provisions of a statutory enactment are viewed as a whole, the court does not construe words and phrases in isolation, but interprets them in light of other relevant portions of the statute. *Sylvester v. Industrial Commission*, 197 Ill.2d 225, 232, 756 N.E.2d 822 (2001). The court presumes that the General Assembly, in its enactment of legislation, did not intend absurdity, inconvenience or injustice. *Burger v. Luther General Hospital*, 198 Ill.2d 21, 40, 759 N.E.2d 533 (2001).

The doctrine of ejusdem generis provides that when a statute lists several classes of persons or things but provides that the list is not exhaustive, the class of unarticulated persons or things will be interpreted as those "other such like" the named persons or things. *City of East St. Louis v. East St. Louis Financial Advisory Authority*, 188 Ill.2d 474, 484, 722 N.E.2d 1129 (1999). In *Farley v. Marion Power Shovel Co.*, 60 Ill.2d 432, 328 N.E.2d 318 (1975), the court applied the doctrine of ejusdem generis to find that a mobile, self-propelled power shovel was not a "structure" within the meaning of the Structural Work Act because it was not "such like" other instrumentalities enumerated in that Act. A canon of statutory construction, the doctrine of ejusdem generis, is that where a statute specifically enumerates several classes of persons or things and immediately following, and classed with such enumeration, the clause embraces "other" persons or

things, the word “other” will generally be read as “other such like,” so that the persons or things therein comprised may be read as ejusdem generis “with,” and not a quality superior to or different from those specifically enumerated.

In *Sierra Club v. Kenny*, 88 Ill.2d 110, 429 N.E.2d 1214 (1981), suit brought to enjoin the Illinois Department of Conservation from logging or inviting bids for logging a portion of a state park. The Department pointed to its statutory authority to sell “gravel, sand, earth or other material” from State-owned land as empowering it to carry out a commercial timber harvest. The Illinois Supreme Court, applying the doctrine of ejusdem generis, ruled that the term “other materials” could only be interpreted to include materials of the same type as gravel, sand or earth and did not include timber.

In *City of Lake Forest v. Pollution Control Board*, 146 Ill.App.3d 848, 497 N.E.2d 181 (1st Dist. 1986), the Board had found that leaf smoke contained contaminants and that by adopting the ordinance, the City had “caused or allowed” the discharge of contaminants in violation of Section 9(a) of the Environmental Protection Act and had also “caused or allowed” the burning of refuse in violation of Section 9 (c) of the Act. The issue on appeal was whether the Board had authority to order the City to repeal an ordinance permitting leaf burning. The appellate court, applying the doctrine of ejusdem generis, concluded that the burning of leaves was not prohibited by the Environmental Protection Act. In construing a statute, the more specific terms prevail over the more general and aid in the construction of the latter. *People v. Singleton* (1984), 103 Ill. 2d 339, 345, 469 N.E. 2d 200; *Board of Education v. Carter* (1983) 119 Ill. App. 3d 857,

861-62, 458 N.E. 2d 50, appeal denied (1984), 99 Ill. 2d 527). The doctrine of ejusdem generis states that when a statutory clause specifically describes several classes of persons or things and then includes “other persons or things,” the word “other” is interpreted to mean “other such like.” (*Coldwell Banker Residential Real Estate Services of Illinois, Inc. v. Clayton* (1985), 105 Ill. 389, 396, 4675 N.E. 2d 536; *St. John’s Evangelical Luthern Church v. Kreider* (1977), 54 Ill. App. 3d 257, 259, 369 N.E. 2d 370.) In determining the meaning of “other discarded materials,” the appellate court looked to the examples provided by the legislature, i.e. garbage and sludge, and ruled that leaves, which naturally grew and fell from trees, were not of the same nature as garbage or sludge, which is generated and discarded by people.

In enacting Section 2.3 of the Act defining the term “excavation,” the legislature expressly provided the example of an operation involving the removal of earth and rock. Under the doctrine of ejusdem generis, the statutory phrase “other material in or on the ground” cannot be construed to include the saw cutting of man-made concrete paving material applied to the earth’s surface. Consistent with the courts’ opinions in *Sierra Cub v. Kenny*, 88 Ill.2d 110, 429 N.E.2d 1214 (1981), and *City of Lake Forest v. Pollution Control Board*, 146 Ill.App.3d 848, 497 N.E.2d 181 (1st Dist. 1986), “other material” must be construed to include only the removal or displacement of naturally-occurring materials that form a part of the earth’s surface. Earth and rock are solid mineral matter composing part of the surface of the globe.

Analogous federal and state laws make it clear that the term “excavation” pertains to operations involving penetration or removal of the surface of the earth, not to the removal of man-made paving materials from the earth’s surface. 29 U.S.C. Sec. 655(a) authorizes the United States Secretary of Labor to promulgate occupational safety standards for construction codified in 29 C.F.R. Part 1926, Subpart P of which covers “Excavation, Trenching and Shoring.” Section 1926.651 of Subpart P bears the caption “Specific excavation requirements.” Section 1926.653(f) defines the term “excavation” as follows:

“Any manmade cavity or depression in the earth’s surface, including its sides, walls, or faces, formed by **earth removal and producing unsupported earth conditions by reasons of the excavation.** If installed forms or similar structures reduce the depth-to-width relationship, an excavation may become a trench.” (Emphasis added).

The Florida Underground Facility Damage Prevention and Safety Act defines “excavation” as “any manmade cut, cavity, trench or depression in the earth’s surface, **formed by the removal of earth, intended to change the grade or level of land,** or penetrate or disturb the surface of the earth.” Fla. Stat. Ann. Section 556.102(5) (Emphasis added).

Similarly, the Georgia Utility Facility Protection Act defines “excavating” as **any operation by which the level or grade of land is changed** and includes, without limitation, grading, trenching, digging, ditching, auguring, scraping, and pile driving.

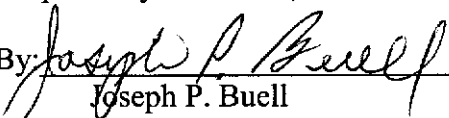
Such term does not include public road maintenance activities. Georgia Stat Ann. 25-9-3.
(Emphasis added).

In the Notice of Violation, the Staff concluded that “under the definition of excavation, the road surface being cut can be considered other material on the ground that is being removed or displaced using power equipment.” This conclusion is erroneous in two ways. First, concrete pavement is not naturally-occurring material “such like” earth and rock, which are expressly referred to in Section 2.3. Second, Section 2.3 of the Act was amended effected July 1, 2002, to include the word “boring” in the enumerated activities covered by the Act as an “excavation,” but saw-cutting was not included. If the legislature had intended to include saw-cutting within the activities included as “excavation,” it would have included saw-cutting with boring in the statutory language. Clearly, the legislature did not intend to include saw-cutting as “excavation” and the Staff’s finding that saw-cutting constitutes “excavation” reads into the statutory language an activity which the legislature did not include. Further in the Staff’s November 16, 2004 Notice of Violation, “it admits that the Illinois Underground Utility Facilities Damage Prevention Act is silent on depth and the Act does not specify any depth for which an activity becomes excavation”. When saw cutting of man-made concrete pavement occurs, the concrete pavement is not moved, removed or otherwise displaced. Saw cutting of man-made concrete material is de minimis. Saw cutting is done before excavation begins and does not destroy material.

Section 4 of the Act requires only those engaged in excavation or demolition to contact the State-Wide One-Call Notice System (JULIE). Section 11(a) of the Act only subjects a person engaged in excavation to a penalty if the person willfully fails to comply with the Act for failure to provide the required notice to JULIE as required by Section 4 of the Act. As a matter of law, the penalty assessed against respondent, Quality Saw & Seal, Inc., pursuant to Section 11 (a) of the Act was erroneous since there was no violation of Section 4(d) of the Act.

WHEREFORE, respondent, **QUALITY SAW & SEAL, INC.**, respectfully requests the Illinois Commerce Commission to determine that there was no violation of Section 4(d) of the Illinois Underground Utility Facilities Damage Prevention Act and to dismiss this cause.

Respectfully submitted,

By: 
Joseph P. Buell

AFFIDAVIT OF ATTORNEY

I, Joseph P. Buell, being duly sworn and under oath, do depose and state that I am a licensed attorney in the State of Illinois and that, were I called upon to give testimony from my own personal knowledge as the matters set forth in this MEMORANDUM IN SUPPORT OF MOTION TO DISMISS, the statements herein made are accurate, true and correct.

By: Joseph P. Buell
Joseph P. Buell

Subscribed and sworn to before
Me this 11th day of July, 2005
Nancy J. Suver
Notary Public



LAW OFFICE OF JOSEPH P. BUELL

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STATE OF ILLINOIS
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Illinois Commerce Commission
On Its Own Motion,

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No. 05-0407

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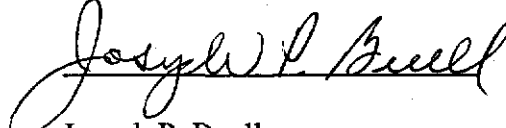
Determination of Liability under the
Illinois Underground Utility Facilities
Damage Prevention Act,

NOTICE OF HAND DELIVERY AND MAILING

TO: SEE ATTACHED SERVICE LIST

PLEASE TAKE NOTICE, that on the 12th day of July, 2005, there was hand delivering to Counsel of Record for the Illinois Commerce Commission and mailed to counsel for the Intervening Petitioner, Illinois Bell Telephone Company (SBC Illinois) the following: **APPEARANCE, MOTION TO DISMISS PURSUANT TO 83 Ill. Adm. Code 200.190, MEMORANDUM IN SUPPORT OF MOTION TO DISMISS, MOTION TO TRANSFER VENUE ON GROUNDS OF FORUM NON CONVENIENS, AND PETITION FOR A SUBPOENA TO ISSUE UPON NORTH SHORE GAS COMPANY FOR THE PRODUCTION OF DOCUMENTS, RECORDS AND ATLAS/PLANT LOCATION RECORDS**, on behalf of the Respondent, Quality Saw & Seal, Inc., a copy of which is attached hereto and served upon you.

LAW OFFICE OF JOSEPH P. BUELL



Joseph P. Buell

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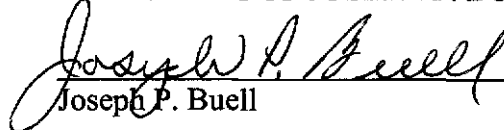
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CERTIFICATE OF ATTORNEY

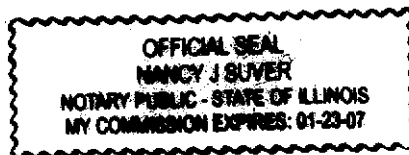
Joseph P. Buell, an Attorney, hereby certifies that I has served a true and correct copy of the foregoing Notice of Hand Delivery and Mailing and the attached, **APPEARANCE, MOTION TO DISMISS PURSUANT TO 83 Ill. ADM. Code 200.190, MEMORANDUM IN SUPPORT OF MOTION TO DISMISS, MOTION TO TRANSFER VENUE ON GROUNDS OF FORUM NON CONVENIENS, AND PETITION FOR A SUBPOENA TO ISSUE UPON NORTH SHORE GAS COMPANY FOR THE PRODUCTION OF DOCUMENTS, RECORDS AND ATLAS/PLANT LOCATION RECORDS**, served upon each person to whom said Notice of Hand Delivery and mailing by delivering on July 12, 2005 a copy hereof to counsel for the Illinois Commerce Commission and the Administrative Law Judge, Stephen Yoder, and mailing to counsel for the Intervening Petitioner, Illinois Bell Telephone Company (SBC), at 20 North Wacker Drive, Suite 1900, Chicago, Illinois before 5:00 p.m., on this 13th day of July, 2005.

LAW OFFICE OF JOSEPH P. BUELL


Joseph P. Buell

Subscribed and sworn to before
me this 11th day of July, 2005.


NOTARY PUBLIC



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05-0407

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